Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO *and* Colton-Wartsila, Inc.

Colton-Wartsila, Inc. *and* Local Union No. 226, International Brotherhood of Pottery and Allied Workers, SIUNA, AFL-CIO, Petitioner. Cases 31-CB-3966 and 31-RC-4863

January 27, 1982

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 2, 1981, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, the Charging Party-Employer filed exceptions and a supporting brief, and the Respondent-Petitioner filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO, and that, pursuant to Section 9(a) of the Act, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees employed by the Employer at its facility located at 330 W. Citrus Street, Colton, California, 92324; excluding all other employees, including office, clerical, accounting, technical and professional employees, employees represented by labor organizations other than the Petitioner, watchmen, guards and supervisors as defined in the Act.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in San Bernardino, California, on August 4, 1981. On December 19, 1980,[1] the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed on October 31, alleging a violation of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, herein called the Act. On that same date, the said Regional Director issued a report on objections, an order consolidating cases, and an order directing hearing and notice of hearing, finding that one objection to conduct affecting the results of the election conducted in Case 31-RC-4863 could best be resolved through a hearing and, as that objection concerned the subject matter already included as an allegation in the complaint issued in Case 31-CB-3966, consolidating the two cases for hearing and decision. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, Colton-Wartsila, Inc., herein called the Employer, has been a corporation duly organized under and existing by virtue of the laws of the State of California, with an office and place of business located in Colton, California, where it has been engaged in the manufacture and sale of sanitary ware. In the course and conduct of these business operations, the Employer annually sells and ships goods or services valued in excess of $50,000 directly to customers located outside the State of California. Therefore, I find, as admitted in the answer, that at all times material the Employer has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The Charging Party-Employer has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[1] Unless otherwise stated, all dates occurred in 1980.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO, herein called Respondent, has been a labor organization within the meaning of Section 2(5) of the Act.

III. CHRONOLOGY OF EVENTS

The sole issue presented in these consolidated cases is whether, during a conversation on October 15, kiln operator Richard Ele had been told, by International Representative Jesse Garcia and by Tenth Vice President Thomas B. Perazzo,[2] that Respondent would, in essence, pay $600 to Ele if he would support Respondent in the representation election scheduled for October 16 in Case 31-RC-4863 and, additionally, if he would persuade other employees to do likewise. Before addressing the evidence directly pertaining to that issue, certain background events must be explained.

Ele had commenced working at the Colton facility, now operated by the Employer, in 1954 when operations there were conducted by Colton Manufacturing, Inc., the Employer's predecessor. At some point in time, Respondent had become the bargaining representative of the employees in a production and maintenance unit at the Colton facility. Ele became a member of Respondent, and monthly dues were deducted from his paycheck. However, in January 1978, Ele had become a foreman, a nonunit position, and had obtained a withdrawal card from Respondent. Ele continued to serve as a foreman until October 1978 when, at his own request, he again became a kiln operator. He testified that, following his return to this bargaining unit position, he had made efforts to rescind the withdrawal card that he had executed and to resume again his full membership status in Respondent. Due to apparent inadvertence, however, dues were not deducted from Ele's paychecks after his return to the unit.

Ele testified that he had not become aware that his dues were not being deducted until Respondent went on strike against Colton Manufacturing, Inc., from February 1 to June 4, 1979. Ele participated in that strike and while it was in progress, he learned that Respondent did not consider him eligible to receive strike benefits because it had received no dues from him during the period after he had ceased being a foreman. Nevertheless, Ele continued participating in the strike for its duration and, in the ordinary course of affairs, would have received $600 in total strike benefits had he been considered eligible to receive them.

As a result of a decertification petition, filed by employee Fedor Benic, on September 10, 1979, a majority of the employees in the production and maintenance unit at the Colton facility voted against continued representation by Respondent in an election conducted on October 12, 1979. However, the matter did not end there. In June, Respondent commenced a new campaign to organize the production and maintenance employees working at the Colton facility, which at this time was being operated by the Employer. As a result of this campaign, Respondent filed the petition in Case 31-RC-4863 on August 14, and an election was scheduled for October 16. During the preceding week, Perazzo was distributing handbills to employees at the Colton facility. When one was offered to Ele, the latter complained about his failure to have received strike benefits from Respondent during the 1979 strike. Perazzo, who was unfamiliar with Ele and with the events of that strike, promised to investigate Ele's assertion and to ensure that Ele received the amount which he claimed as strike benefits if it turned out that he was indeed entitled to it.

Later Perazzo described the incident to Garcia who, unfamiliar with the events surrounding the 1979 strike, checked Respondent's records, ascertaining that Ele had not received strike benefits during the strike because his dues had not been paid. Garcia, accompanied by Perazzo, then journeyed to Ele's home, but on that occasion Ele was not there. Respondent's two representatives returned to Ele's home on October 15, the day before the election. On that date, they did have an opportunity to speak with Ele and it is that conversation that is the subject of the complaint and is the only one of the Employer's objections that has been consolidated for hearing in this proceeding.

With regard to this conversation, Ele testified that while he had been working in the yard of his home, cutting glass to replace missing panes in his garage window, Garcia and Perazzo had driven up and had walked over to where he was working. Initially, according to Ele, Garcia had explained that Respondent's records disclosed that Ele had not been eligible to receive strike benefits because he had not been paying dues, but then had added that Ele deserved the money because he had worked in a union shop and had promised, "We'll get you the pay—we can get your pay." Ele testified that when he had pointed out that Sam Fullerton[3] had said that Ele could not obtain the money, Garcia had replied that Fullerton "isn't here now. He's out of it," that International President Lester Null "is out here now in this area and we'll go see him and see whether we can get some money for you," and that "[w]e can get some money for you now but, after the election, we can get it all after the Union gets in." Garcia added, "We know we've got the election won, but a little insurance don't hurt. . . . Do you have any friends that would vote for the Union?"[4] Ele replied that he had a lot of friends who would do so if Respondent treated them "right." Then, he mentioned that he was owed $750 for strike benefits, but Garcia responded that the correct amount was $600. When Ele again expressed skepticism about being paid, Garcia replied, according to Ele, "Well, we'll get you some now. We'll go see Mr. Null and we'll get you some and we'll give you the rest after the Union gets in."

Both Garcia and Perazzo denied expressly that the former had promised cash or strike benefits to Ele if he

[2] It is admitted that at all times material Garcia and Perazzo had each been an agent of Respondent, acting on its behalf, within the meaning of Sec. 2(13) of the Act.

[3] Sam Fulleerton was an official of Respondent at the time the strike had been in progress.

[4] Ele testified that Garcia and Perazzo "mentioned about my friends several times" during this conversation.

would vote for Respondent in the election. Moreover, both of them denied that Ele had been promised cash or strike benefits in return for persuading other employees to vote for Respondent. As had Ele, both Perazzo and Garcia testified that the latter had initiated the October 15 conversation by explaining that Ele had not been entitled to strike benefits because he had not been paying dues prior to the strike. Moreover, both of them agreed that Fullerton's name had arisen during the conversation. However, both testified that this had occurred when Ele had asserted that Fullerton had promised to secure the strike benefits and then had persuaded Respondent not to pay them to Ele. Both union officials testified that Garcia had replied to Ele's remark by saying that Lester Null had assured everybody in Respondent that Fullerton was no longer involved with Respondent and that Garcia and Perazzo were in charge of it. Both agreed that Perazzo had told Ele that Respondent expected to win the upcoming election. Both of them testified that one or the other had concluded the conversation by saying that Ele's support would be appreciated. Garcia testified that this was a normal concluding remark made to employees during an election campaign.

The General Counsel and the Charging Party-Employer presented four additional witnesses. One, Victo Heavilin, is Ele's nephew and had been working in and around Ele's garage on October 15 during the conversation discussed above. Heavilin testified that, through the missing window panes, he had overheard one of Respondent's officials say to Ele, "If you could help us get in, we could get you $600, but we can't promise all of it to you." Other than the concluding remark, "We'll keep in touch," which he also attributed to one of the two officials, Heavilin testified that he had not heard any other comments made during that conversation.

Ele testified that, after Garcia and Perazzo had left, he had contacted other employees to tell them what had occurred. Ele identified three other employees with whom he had spoken: Alfred Villarreal, Robert Hudson, and Benic. According to Ele, he telephoned Villarreal and said that "Mr. Garcia and the Union are going to give me my strike pay." Ele further testified that "I mentioned the $600 I believe that they said they was [sic] going to get me, but I don't remember any other words with him except just telling him that I was going to get some money." Villarreal, however, testified only that Ele "told me that two men from the Union came by his house and offered him some money if he would vote for the Union." Villarreal denied that Ele had identified the two men by name and denied that Ele had said what amounts he had been offered.

Ele testified that, after speaking to Villarreal, he had gone to Hudson's home where, according to Ele, he had related to Hudson that "the Union was going to pay my strike pay, that I was going to get some now and I would get more after the Union got in." When asked initially what had been said to him by Ele, Hudson testified only that Ele had said that "two people from the Union had come to visit him" and "that he [Ele] would would get some money if he was to vote for the Union, that he would get part of this money then and probably after the election get the rest of his money that was due him. I think we talked about $500 or $600." After examining his pretrial examination, Hudson added that Ele had said that "they had offered him some money, that, if he would vote for the Union and if he would get some of the guys to help him bring the Union back in, they could get him the rest of the money." Yet, before Hudson had testified, Ele, when called as a witness for the General Counsel, had denied specifically that, during his October 15 conversation with Garcia and Perazzo, anything had been said about him (Ele) actually voting for Respondent in return for the strike benefits payment. Rather, according to Ele, Garcia had said only that Ele would get all of the strike benefits if Respondent won the election.

Finally, Ele testified that he had spoken with Benic by telephone and that he had told Benic, "I was going to get some money. They was [sic] going to bring me some money, and then, when the Union got in, I'd get the rest of my money." According to Ele, Benic had retorted simply that such an arrangement was illegal. Benic testified that Ele had explained that Garcia and Perazzo had promised to attempt to secure the strike benefits for Ele and that they had promised "to give him some money now and, after the election, they're going to give him the rest." Benic testified that he told Ele, "if they did that, that's illegal because, by the rules of the NLRB for the election, any bribery or any soliciting . . . was illegal."

The election was conducted on October 16 from 6:30 to 7:30 a.m. and from 2:30 to 3:30 p.m.[5] Ele testified that he had reported to the polling place that morning before 7 a.m. "to stop Bob Hudson from voting for the Union,"[6] in essence, because Garcia and Perazzo had not returned to his house the preceding evening with partial payment of the strike benefits and, accordingly, Ele "was mad because I didn't get the money that night."

IV. ANALYSIS

When they testified, it did not appear that the witnesses called by the General Counsel and by the Charging Party were candidly relating the events that had transpired on October 15 and 16. Rather, it appeared that they were attempting to tailor their accounts of those events, pertaining to and surrounding Garcia's and Perazzo's conversation with Ele, in a manner that would establish and fortify a case against Respondent. Certainly, Ele had a motive for doing so. As his initial conversation with Perazzo, during the week preceding the election, demonstrates, he had been upset at not having received strike benefits for the period that he had been on strike in 1979. Further, Ele admitted that, on the morning of the election, he had continued to be "mad" about not having received those benefits. Although he asserted that his anger that morning had been occasioned by Respondent's failure to deliver the partial payment to him during

[5] This election was conducted in a bargaining unit of:

All production and maintenance employees employed by the Employer at its facility located at 330 W. Citrus Street, Colton, California, 92324; excluding all other employees, including office, clerical, accounting, technical and professional employees, employees represented by labor organizations other than the Petitioner, watchmen, guards and supervisors as defined in the Act.

[6] Hudson testified that he had not voted in the election at all that day.

the preceding evening, it is equally inferable that he had been "mad" because Garcia and Perazzo had told him on October 15 that Respondent was adhering to the position that he was not entitled to those benefits. Heavilin, of course, is Ele's nephew. Benic had been the employee who had filed the decertification petition in 1979. There has been no showing that his lack of sympathy for representation by Respondent had changed since that time. Accordingly, while it is no doubt accurate, as the General Counsel argues, that Garcia and Perazzo had a "substantial stake . . . in the outcome of the election and of this proceeding," it is equally accurate that at least some the General Counsel's and Charging Party's witnesses, particularly Ele, could hardly be characterized fairly as being without interest in the outcome of these matters.

In point of fact, while the General Counsel and Charging Party assert that Heavilin's testimony, in effect, tends to corroborate that of Ele, concerning the promise assertedly made to the latter by Garcia and Perazzo, comparison of their testimony tends to show the contrary. Thus, although Heavilin claimed that he had overheard an assurance to try to get $600 for Ele if the latter helped Respondent "get in," he testified also that the speaker had qualified that assurance by adding "but we can't promise all of it to you." Yet, in his description of the purported promise made by Garcia and Perazzo, Ele made no reference to such a qualification. To the contrary, his description of it was unqualified: all of the strike benefits that Ele would have received in 1979 would be paid to him if Respondent prevailed in the election. True, some portions of Ele's various descriptions of the October 15 conversation are susceptible of an interpretation that Garcia had expressed doubt concerning whether the benefits could be paid, at all, to Ele ("We'll go and check with Mr. Null and see.") But, at no point did Ele describe either Garcia or Perazzo expressing any reservation, similar to that described by Heavilin, about whether the entire $600 would be paid if the decision was made to pay Ele at all. Accordingly, Heavilin's testimony, concerning the scrap of conversation that he assertedly overheard, does not tend to corroborate Ele's account of what purportedly had been said to him on October 15 by Garcia and Perazzo.

Inconsistencies also arise from comparison of the various versions advanced of Ele's purported dissemination to other employees of the remarks made by Garcia and Perazzo. For example, as set forth above, Ele claimed that, when he had spoken to Villarreal, he (Ele) had related that Garcia was going to give him strike pay in the amount of $600. Yet, Villarreal denied expressly that, during their telephone conversation, Ele had mentioned either the amount that he had been offered or the names of Respondent's representatives. Hudson, whose memory of what Ele assertedly had said to him had to be refreshed from his pretrial affidavit, claimed that Ele had related that part of the price for receiving the strike benefits would be Ele's agreement to vote for Respondent in the election. Yet, Ele denied that anything had been said specifically by Garcia and Perazzo about Ele actually voting for Respondent. Indeed, at no point did Ele testify that he told Hudson that the strike benefits had been promised to him in return for his assurance that he would vote for Respondent in the election.

Possibly the most significant inconsistency arose from Ele's and Benic's accounts of their purported telephone conversation following Garcia and Perazzo's visit of October 15. During direct examination, Ele testified that he had called employees other than Villarreal on the evening of October 15 and then testified that he had spoken with Benic, telling him, as set forth above, that "I was going to get some money. They was [sic] going to bring me some money, and then, when the Union got in, I'd get the rest of my money." The substance of this account, of course, comports with Ele's description of his conversation with Garcia and Perazzo. However, during cross-examination, Ele switched direction and testified that his conversation with Benic had not occurred until the following morning, October 16. Benic agreed that he had not spoken with Ele until the morning of October 16, testifying, as described above, that Ele had reported that Respondent's agents had promised "to give him some money now and, after the election . . . to give him the rest."

Yet, the election had been scheduled to commence at 6:30 a.m., October 16. Thus, by the time Ele had spoken to Benic that morning it would have been obvious that Respondent was not going to pay part of the strike benefits to Ele prior to the election, as Ele claimed that Garcia and Perazzo had promised to do. Indeed, Ele acknowledged that he had gone to the Colton facility at 7 that morning, before having spoken with Benic, because he had been "mad" about not having received any money from Respondent and had wanted to stop Hudson from voting for it. In these circumstances, it would have been illogical for Ele to have told Benic that Respondent "was going to bring me some money," as Ele described it, or was "going to give him some money now," as Benic testified. For, by his own admission, by the time he had spoken to Benic, Ele knew that that was not "going to" happen.

Of course, it could be argued that Ele had been doing no more than advising Benic of the promise that had been made by Respondent's officials. Yet, it seems unlikely that Ele would have withheld from Benic the fact that the initial part of that promise had been broken by Respondent. Certainly, Benic provided Ele ample opportunity to disclose that the preelection portion of the full payment had not been made. For, Benic testified, as set forth above, that he had responded to Ele's description of the promise by pointing out that "*if they did that*, that's illegal . . . ." (Emphasis supplied.) In the final analysis, what appears to have happened is that, in their haste to fortify the case that Respondent had made an illegal promise that Ele had disseminated to other employees, Ele and Benic lost track of the setting against which their asserted telephone conversation had occurred.

Both the General Counsel and the Charging Party argue that it simply made no sense for Garcia and Perazzo, both vitally concerned that Respondent prevail in the election, to take time out simply to tell an employee something that would tend to lead that employee to vote against Respondent. While a superficially logical argu-

ment, it overlooks certain factors. First, neither Garcia nor Perazzo had been involved in the 1979 strike, or in the decision at that time to deny strike benefits to Ele. Second, neither Garcia nor Perazzo had ever met Ele prior to the latter's encounter with Perazzo at the Colton facility during the week prior to the election. Consequently, neither official of Respondent had ever had the opportunity to discuss with Ele the latter's complaint about not having received his strike benefits. Third, in describing their conversation during the week prior to the election, both Ele and Perazzo agreed that the former had said only, in essence, that he had walked the picket line for 13 weeks and had been denied strike benefits. Neither of them testified that Ele had explained fully to Perazzo, at that time, what had caused Respondent to deny strike benefits to Ele. Thus, so far as the record discloses, Perazzo had been unaware that Ele already knew that he had been denied those benefits because his dues had not been paid during the period immediately preceding the strike. Finally, so far as the record discloses, Respondent's records did not show that Ele had been made aware of the reason that Respondent had denied him strike benefits in 1979. In sum, it was hardly illogical for Garcia and Perazzo to assume that Ele was unaware of the true reason that he had been denied strike benefits in 1979 and, based on that assumption, for them to understand how Ele could be mistakenly justified in believing that he had been "cheated."

It is against this background that Garcia decided, having ascertained from Respondent's records why the strike benefits had not been paid to Ele, that, as Garcia testified, "[W]e'd better let this guy know why he didn't receive any benefits, you know, so he'd get that part of it straight. So we went to explain to him why he never received any benefits." It may be Pollyannaish, but hardly uncommon in the course of human affairs, to believe that people will accept even an adverse decision if accorded a logical explanation for it. Here, Perazzo had been confronted with a facially valid complaint by an employee who appeared not to be aware of the reason he had been deprived of a benefit to which he seemingly was entitled. Upon discovering the reason for that deprivation, Garcia and Perazzo sought out Ele to explain that the deprivation had not been wrongful or capricious, but rather, in Respondent's view, had a valid basis: the lack of dues payments on Ele's behalf during the period preceding the strike. In these circumstances, it cannot be said that Garcia and Perazzo acted illogically in considering it possible that, once having heard that explanation, Ele might change his mind about opposing representation by Respondent—or, as Garcia pointed out, at least that he might stop villifying Respondent by saying that he had been "cheated" out of these benefits.

But, if Garcia and Perazzo's visit to Ele was not illogical in the circumstances, it can hardly be said that the scenario portrayed by Ele was a logical one. For, to accept Ele's testimony about the October 15 conversation would be to conclude that Respondent's agents had promised to deliver money to him prior to the election, to secure his support in that election, and then had undermined their own purported effort by failing to return with the partial preelection payment. Both Garcia and Perazzo appeared sufficiently knowledgeable to perceive that any favorable change in Ele's attitude toward Respondent resulting from their promise quickly would be undermined by failure to fulfill their side of the bargain. Accordingly, it appears unlikely that they would have put themselves in the position of promising to perform an act before the election, in return for Ele's support in it, if they had any question concerning their ability to perform that promised act.

The foregoing considerations, among others not all of which are enumerated specifically herein, confirm my impression at the hearing, based on their demeanor, that Ele and the other witnesses called by the General Counsel and the Charging Party were not testifying candidly. Inasmuch as there is no credible evidence that Respondent's officials made any unlawful or objectionable remarks of the nature alleged In the complaint and report on objections, I shall recommend that the complaint be dismissed, that the objection be overruled, and that Respondent be certified as the bargaining representative of the employees in the above-described bargaining unit.

CONCLUSIONS OF LAW

1. Colton-Wartsila, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO, has not violated the Act in any manner alleged in the complaint.

Based on the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that Case 31-RC-4863 be severed from Case 31-CB-3966, that the objection in Case 31-RC-4863 be overruled, and that Local Union No. 226, International Brotherhood of Pottery and Allied Workers, Seafarers' International Union of North America, AFL-CIO, be certified as the collective-bargaining representative of the employees in the appropriate bargaining unit.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herin shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.